

ORIGINAL

FILED  
CLERKUNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

2015 JUN -2 PM 4:16

Mister Softee Inc., and Mister  
Softee of Queens, Inc.

Plaintiff,

-against-

Gus Anthony Tufos

Defendant(s).

NOTICE OF MOTION

13 CV 4829 (JMA)

PLEASE TAKE NOTICE that upon the annexed affidavit or affirmation of Gus Anthony Tufos, sworn to or affirmed

\* June 2nd, 2015 ~~and upon the complaint herein,~~  
~~PRO SE DEFENDANT~~  
~~plaintiff~~ will move this Court, Joan M. Azrack, U.S.D.J.,  
 in room       , United States Courthouse, Brooklyn, New York 11201,  
 on the        day of       , 20      , at        or as soon  
~~PRO SE DEFENDANT~~  
 thereafter as ~~counsel~~ can be heard, for an order pursuant to  
~~Rule~~        of the Federal Rules of Civil Procedure granting  
my motion to vacate the default judgement  
that was issued on February 9th, 2015.

\* Dated: June 2, 2015

Plaintiff Pro Se

Signature

Gus Anthony Tufos

Print Name

21-02 123'd St.

Address

College Point, NY 11356917-584-6654

Phone #

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Mister Softee, Inc., and Mister  
Softee of Queens, Inc.,  
Plaintiff,

-against-

Gus Anthony Toutos  
Defendant(s).

AFFIDAVIT/AFFIRMATION

13 CV 4829 (JMA)

STATE OF NEW YORK )  
COUNTY OF Queens ) ss.:

I, Gus Anthony Toutos, [being duly sworn] deposes and says  
[or: make the following affirmation under the penalties of  
perjury]:

I, Gus Anthony Toutos, am the ~~plaintiff~~ **DEFENDANT** in the above  
entitled action, and respectfully move this Court to issue an  
order Granting my motion to vacate.

The reason why I am entitled to the relief I seek is the  
following: Please see next page

WHEREFORE, I respectfully request that the court grant the  
within motion, as well as such other and further relief that may  
be just and proper.

Sworn to before me this  
day of \_\_\_\_\_, 20\_\_

Notary Public

Signature

Print Your name  
Plaintiff Pro Se

Defendant

I was not served properly because I did not receive any paperwork related to this case. A document filed in court states several attempts were made to serve the paperwork. However, I never received any paperwork affixed to my door nor did I receive paperwork by mail. In fact, the first document I received was at the end of May 2015 which was the default judgment. How can I respond to a court order if I never received the document ordering me to do something?

Furthermore, in 2013, I underwent major open heart surgery. This surgery required a lengthy recovery period along with frequent hospital and physician visits.

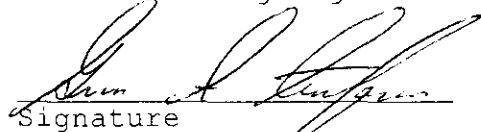
Additionally, since I received the default judgment, I have made numerous attempts to contact attorney Frank A. Reino (May 26, 2015; May 28, 2015; June 1, 2015) with no success. For this reason, I am requesting a conference ASAP to resolve this issue.

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OR: I declare under penalty of perjury that the foregoing is  
true and correct.

Executed on

June 2, 2015

  
\_\_\_\_\_  
Signature  
Plaintiff Pro Se

ORIGINAL

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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CLERK

2015 JUN -2 PM 4: 16

Mister Softee, Inc., and Mister  
Softee of Queens, Inc.,  
Plaintiff,

-against-

Gus Anthony Toutos  
Defendants.

Affirmation of Service

13 CV 4829(JMA)

I, Gus A Toutos, declare under penalty

BY U.S. MAIL

of perjury that I have served a copy of the attached Notice of  
Motion and Affirmation/Affidavit in support upon

Eric Lawrence Adler

whose address is: 45 Main Street, Suite 500  
Brooklyn, NY 11201

Dated: June 2, 2015  
New York

Gus A Toutos  
Signature

2402 123rd St.  
Address

College Point, NY 11356  
City, State & Zip Code

917-584-6654  
Telephone

And

Frank A. Reind  
21 South 21st Street  
Philadelphia, PA 19103

CLOSED, TRADEMARK

**U.S. District Court  
Eastern District of New York (Brooklyn)  
CIVIL DOCKET FOR CASE #: 1:13-cv-04829-JMA**

Mister Softee, Inc. et al v. Silis, Inc. et al  
Assigned to: Judge Joan M. Azrack  
Cause: 15:1114 Trademark Infringement

Date Filed: 08/28/2013  
Date Terminated: 02/09/2015  
Jury Demand: None  
Nature of Suit: 840 Trademark  
Jurisdiction: Federal Question

**Plaintiff**

**Mister Softee, Inc.**

represented by **Eric Lawrence Adler**  
Adler Vermillion & Skoalich LLP  
45 Main Street  
Suite 500  
Brooklyn, NY 11201  
347-620-5291  
Fax: 347-342-3844  
Email: eric@adlervermillion.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Gerald Derevyanny**  
Adler Vermillion & Skocilich  
45 Main St  
Suite #500  
Brooklyn, NY 11201  
(206)427-4568  
Fax: (347)342-3844  
Email: jerry@adlervermillion.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Mark Howard Jaffe**  
Tor Ekeland PC  
155 Water Street  
Sixth Floor, Suite 2  
Brooklyn, NY 11201  
347-515-6849  
Fax: 718-504-5417  
Email: mark@torekeland.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Mister Softee of Queens, Inc.**represented by **Eric Lawrence Adler**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Gerald Derevyanny**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Mark Howard Jaffe**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED*

V.

**Defendant****Silis, Inc.****Defendant****Remohada, Inc.****Defendant****Gus Anthony Toufos****Defendant****John Silver, LLC***TERMINATED: 02/19/2014***Defendant****John Argyros***TERMINATED: 02/19/2014*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
08/28/2013	<u>1</u>	COMPLAINT against All Defendants Disclosure Statement on Civil Cover Sheet completed -yes,, filed by Mister Softee, Inc., Mister Softee of Queens, Inc.. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B) (Bowens, Priscilla) (Entered: 08/28/2013)
08/28/2013	<u>2</u>	In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that <i>if</i> all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action including a (jury or nonjury) trial and to order the entry of a final judgment. Attached to the Notice is a blank copy of the consent form that should be filled out, signed and filed electronically <b>only if all</b> parties wish to consent. The form may also be accessed at the following

		link: <a href="http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf">http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf</a> . <b>You may withhold your consent without adverse substantive consequences. Do NOT return or file the consent <u>unless</u> all parties have signed the consent.</b> (Bowens, Priscilla) (Entered: 08/28/2013)
08/28/2013		The case of <b>Mister Softee, Inc. et al v. Silis, Inc. et al</b> , has been opened in the Eastern District of New York. The case number is <b>13cv4829</b> . PLEASE NOTE: You must pay the case filing fee <b><u>within seven (7) days</u></b> . Select the event (Civil Case Filing Fee) and pay online. (Bowens, Priscilla) (Entered: 08/28/2013)
08/28/2013	<u>3</u>	Notice of Report on the filing of an action regarding a Patent or Trademark. (Attachments: # <u>1</u> Complaint) (Rocco, Christine) (Entered: 08/28/2013)
08/28/2013		SCHEDULING ORDER: An Initial Conference will be held in Courtroom 6E, 225 Cadman Plaza East, before Magistrate Judge Azrack on November 12, 2013 at 11:00 AM. All counsel must be present and are advised to review Judge Azrack's revised Individual Rules, which are available on the District Court's web site, prior to the conference. <b><u>Plaintiff's counsel is directed to confirm with defendant's counsel that all necessary participants are aware of this conference.</u></b> Any request for an adjournment must be made in the form of a letter motion filed on ECF at least forty-eight (48) hours before the scheduled conference and must indicate which parties consent to the adjournment. Ordered by Magistrate Judge Joan M. Azrack on 8/28/2013. (D'Antonio, Elizabeth) (Entered: 08/28/2013)
09/03/2013		FILING FEE: \$ 400, receipt number 4653063467 (Bowens, Priscilla) (Entered: 09/03/2013)
09/03/2013	<u>4</u>	Summons Issued as to All Defendants. (Bowens, Priscilla) (Entered: 09/03/2013)
09/16/2013	<u>5</u>	NOTICE of Appearance by Gerald Derevyanny on behalf of All Plaintiffs (aty to be noticed) (Derevyanny, Gerald) (Entered: 09/16/2013)
09/16/2013	<u>6</u>	SUMMONS Returned Executed by Mister Softee, Inc., Mister Softee of Queens, Inc.. Remohada, Inc. served on 9/4/2013, answer due 9/25/2013. (Derevyanny, Gerald) (Entered: 09/16/2013)
09/16/2013	<u>7</u>	SUMMONS Returned Executed by Mister Softee, Inc., Mister Softee of Queens, Inc.. Silis, Inc. served on 9/4/2013, answer due 9/25/2013. (Derevyanny, Gerald) (Entered: 09/16/2013)
10/03/2013	<u>8</u>	SUMMONS Returned Executed by Mister Softee, Inc., Mister Softee of Queens, Inc.. Gus Anthony Toufos served on 9/26/2013, answer due 10/17/2013. (Derevyanny, Gerald) (Entered: 10/03/2013)
10/11/2013	<u>9</u>	Request for Certificate of Default by Mister Softee of Queens, Inc., Mister Softee, Inc. (Attachments: # <u>1</u> Affidavit in Support, # <u>2</u> Exhibit) (Derevyanny, Gerald) (Entered: 10/11/2013)



10/11/2013	<u>10</u>	Request for Certificate of Default by Mister Softee of Queens, Inc., Mister Softee, Inc. (Attachments: # <u>1</u> Affidavit in Support, # <u>2</u> Exhibit) (Derevyanny, Gerald) (Entered: 10/11/2013)
10/15/2013		Clerk's ENTRY OF DEFAULT It appearing from the docket maintained in this action that Defendant Remohada, Inc. has failed to appear or otherwise defend this action, the default of Defendant Remohada, Inc. is hereby noted pursuant to Rule 55a of the Federal Rules of Civil Procedure. (Hamilton, Janet) (Entered: 10/15/2013)
10/15/2013		Clerk's ENTRY OF DEFAULT It appearing from the docket maintained in this action that Defendant Silis, Inc. has failed to appear or otherwise defend this action, the default of Defendant Silis, Inc. is hereby noted pursuant to Rule 55a of the Federal Rules of Civil Procedure. (Hamilton, Janet) (Entered: 10/15/2013)
10/23/2013	<u>11</u>	Request for Certificate of Default by Mister Softee of Queens, Inc., Mister Softee, Inc. (Attachments: # <u>1</u> Affidavit in Support Aff. in support, # <u>2</u> Exhibit E-filed Aff. of Service) (Derevyanny, Gerald) (Entered: 10/23/2013)
11/01/2013	<u>12</u>	Letter MOTION to Adjourn Conference by Mister Softee of Queens, Inc., Mister Softee, Inc.. (Derevyanny, Gerald) (Entered: 11/01/2013)
11/01/2013		ORDER granting <u>12</u> Motion to Adjourn Conference. Conference is adjourned to December 17, 2013 at 1:30 PM. Ordered by Magistrate Judge Joan M. Azrack on 11/1/2013. Plaintiff's counsel is directed to confirm with defendant's counsel that all necessary participants are aware of this conference. Any request for an adjournment must be made in the form of a letter motion filed on ECF at least forty-eight (48) hours before the scheduled conference and must indicate which parties consent to the adjournment. (D'Antonio, Elizabeth) (Entered: 11/01/2013)
11/07/2013		Clerk's ENTRY OF DEFAULT It appearing from the docket maintained in this action that Defendant Gus Anthony Toufos has failed to appear or otherwise defend this action, the default of Defendant Gus Anthony Toufos is hereby noted pursuant to Rule 55a of the Federal Rules of Civil Procedure. (Hamilton, Janet) (Entered: 11/07/2013)
12/05/2013	<u>13</u>	NOTICE of Voluntary Dismissal by Mister Softee of Queens, Inc., Mister Softee, Inc. <i>as to John Silver, LLC and John Argyros</i> (Derevyanny, Gerald) (Entered: 12/05/2013)
12/06/2013		SCHEDULING ORDER: In light of Notice of Voluntary Dismissal <u>13</u> , the conference scheduled for December 17, 2013 at 1:30 PM is hereby cancelled. Plaintiffs shall their motion for default judgment by January 24, 2014. Ordered by Magistrate Judge Joan M. Azrack on 12/6/2013. (Terranova, Robert) (Entered: 12/06/2013)
12/09/2013	<u>14</u>	Notice of Report on the filing of an action regarding a Patent or Trademark. (Attachments: # <u>1</u> Notice of voluntary dismissal) (Rocco, Christine) (Entered: 12/09/2013)

01/17/2014	<u>15</u>	First MOTION for Default Judgment by Mister Softee of Queens, Inc., Mister Softee, Inc.. Responses due by 2/17/2014 (Attachments: # <u>1</u> Memorandum in Support Memo in support of motion, # <u>2</u> Affidavit in Support Attorney cert in support, # <u>3</u> Affidavit in Support Attorney cert in support, # <u>4</u> Proposed Judgment Proposed form of default judgment, # <u>5</u> Affidavit of Service Aff of service) (Derevyanny, Gerald) (Entered: 01/17/2014)
02/25/2014	<u>16</u>	ORDER REFERRING MOTION: <u>15</u> First MOTION for Default Judgment against three defendants. ( Ordered by Judge Sandra L. Townes on 2/19/2014 ) Motions referred to Joan M. Azrack. (Guzzi, Roseann) (Entered: 02/25/2014)
03/18/2014	<u>17</u>	AFFIDAVIT/AFFIRMATION re <u>15</u> First MOTION for Default Judgment <i>Supplemental Affidavit of Gerald Derevyanny</i> by Mister Softee of Queens, Inc., Mister Softee, Inc. (Derevyanny, Gerald) (Entered: 03/18/2014)
01/13/2015		ORDER REASSIGNING CASE. Case reassigned to Judge Joan M. Azrack for all further proceedings. Judge Sandra L. Townes no longer assigned to case. Ordered by Chief Judge Carol Bagley Amon on 1/13/2015. (Bowens, Priscilla) (Entered: 01/14/2015)
01/26/2015	<u>18</u>	ORDER granting <u>15</u> Motion for Default Judgment. The Court grants plaintiffs' motion for default judgment against Silis, Inc.; Remohada, Inc., and Gus Anthony Toufos. Further, the Court: (1) permanently enjoins defendants, their agents, employees, and any person acting in concert with them from using Mister Softee, Inc.'s proprietary trademarks and trade dress or any colorable imitation in any manner whatsoever; (2) orders defendants to destroy all labels, signs, prints, packages, wrappers, receptacles, and advertisements in their possession bearing the word and/or symbol that is the subject of the trademark or trade dress violation or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same pursuant to 15 U.S.C. § 1118; and (3) orders defendants to make all appropriate alterations to their trucks so as not to use Mister Softee's proprietary trade dress or colorable imitation in any manner whatsoever and to provide proof to the plaintiffs that their infringing trucks have been de-identified no more than ten days after receiving notice of this order. The Court also awards plaintiffs \$7,337 in attorneys fees and \$1444.86 costs. Each defendant shall be individually liable for \$926.81 in attorneys fees and costs, and jointly and severally liable for \$6001.43 in attorneys fees and costs. The Clerk of the Court is respectfully directed to enter judgment and close this case. Ordered by Judge Joan M. Azrack on 1/26/2015. (Petilla, Charlotte) (Entered: 01/26/2015)
02/09/2015	<u>19</u>	DEFAULT JUDGMENT in favor of Mister Softee of Queens, Inc., Mister Softee, Inc. against Remohada, Inc., Silis, Inc., Gus Anthony Toufos. ORDERED AND ADJUDGED that plaintiffs motion for default judgment against Silis, Inc., Remohada, Inc., and Gus Anthony Toufos is granted; that defendants, their agents, employees, and any person acting in concert with them are permanently enjoined from using Mister Softee, Inc.'s proprietary

		<p>trademarks and trade dress or any colorable imitation in any manner whatsoever; that defendants are ordered to destroy all labels, signs, prints, packages, wrappers, receptacles, and advertisements in their possession bearing the word and/or symbol that is the subject of the trademark or trade dress violation or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same pursuant to 15 U.S.C. § 1118; that defendants are ordered to make all appropriate alterations to their trucks so as not to use Mister Softees proprietary trade dress or colorable imitation in any manner whatsoever and to provide proof to the plaintiffs that their infringing trucks have been de-identified no more than ten days after receiving notice of the January 26, 2015 Order; that plaintiffs are awarded \$7,337 in attorneys fees and \$1444.86 costs; that each defendant shall be individually liable for \$926.81 in attorneys fees and costs, and jointly and severally liable for \$6001.43 in attorneys fees and costs; and that this case is hereby closed. Ordered by Clerk of the Court on 2/9/2015. (Posillico, Lauren) (Entered: 02/11/2015)</p>
02/18/2015	<u>20</u>	<p>Notice of Report on the filing of an action regarding a Patent or Trademark. (Attachments: # <u>1</u> default judgment) (Rocco, Christine) (Entered: 02/18/2015)</p>
04/27/2015	<u>21</u>	<p>NOTICE of Appearance by Mark Howard Jaffe on behalf of All Plaintiffs (aty to be noticed) (Jaffe, Mark) (Entered: 04/27/2015)</p>
04/28/2015	<del>21</del> <u>22</u>	<p>First MOTION for Contempt <i>and Post-Judgment Enforcement</i> by Mister Softee of Queens, Inc., Mister Softee, Inc.. (Attachments: # <u>1</u> Proposed Order Proposed Order for Seizure, # <u>2</u> Proposed Order Proposed Order of Contempt, # <u>3</u> Memorandum in Support Memorandum of Law in Support, # <u>4</u> Affidavit in Support Affidavit of Frank A. Reino, # <u>5</u> Affidavit in Support Affidavit of Nathaniel Johnson, # <u>6</u> Affidavit of Service Certificate of Service) (Jaffe, Mark) (Entered: 04/28/2015)</p>